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Supreme Court, U.S.
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No. 94-331

In The
Supreme Court of the United States
October Term, 1994

Minnesota Commissioner of Revenue
and the State of Minnesota,
Petitioners,

v.

Norwest Bank Duluth, N.A.,
Respondent.

Minnesota Commissioner of Revenue,
Petitioner,

v.

Cambridge State Bank, et al.,
Respondents.

On Petition For Writ of Certiorari
To the Minnesota Supreme Court

Brief in Opposition

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court was correct in holding that Respondents did not have a clear and certain predeprivation remedy under Minnesota law to challenge an unconstitutional tax.

2. Whether the Due Process Clause precludes a state court from ordering refunds of a voluntarily paid tax where a state refund statute has been construed as permitting taxpayers to obtain refunds of voluntarily paid taxes.

3. Whether estoppel under the so-called acceptance of benefits doctrine is a procedural bar within the meaning of *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), and, if so, whether the Minnesota Supreme Court erred in refusing to apply it.

LIST OF PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings in the Minnesota Supreme Court were: (1) Respondents Norwest Bank Duluth, N.A. ("Norwest"), Cambridge State Bank ("Cambridge"), First Security State Bank of Sleepy Eye ("First Security") and Midway National Bank of St. Paul ("Midway"), and (2) Petitioners the Commissioner of the Minnesota Department of Revenue and the State of Minnesota. The current Minnesota Commissioner of Revenue is Morris J. Anderson.

The following is a Rule 29.1 listing of parent companies of the Respondents and subsidiaries of the Respondents other than wholly-owned subsidiaries.

Norwest Bank Duluth, N.A.
Norwest Corporation

Cambridge State Bank
None

First Security State Bank of Sleepy Eye
First Sleepy Eye Bancorp

Midway National Bank of St. Paul
None

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Respondents respectfully request that this Court deny the Petition for Writ of Certiorari (hereinafter, "Pet.") seeking review of the decision of the Minnesota Supreme Court in this case. The opinion of the Minnesota Supreme Court is reported at 514 N.W.2d 565 and is reprinted in the appendix to the petition at App. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' summary of Minnesota statutes states that "orders of the Commissioner of Revenue assessing taxes were appealable to the Minnesota Tax Court," and that "prepayment of taxes in dispute was not required in order to appeal a tax assessment." Pet. 3. However, as discussed elsewhere in the petition, the Tax Court's power to review and redetermine orders of the Commissioner of Revenue (the "Commissioner") under Minn. Stat. § 271.05 (1980) was construed by the Minnesota Supreme Court not to extend to orders rejecting constitutional challenges to a tax. *In re McCannel*, 301 N.W.2d 910 (Minn. 1980).

Certain other Minnesota procedural statutes are relevant to this case and are reprinted in the appendix hereto (hereinafter, "Resp. App."). These include: the tax assessment provisions, Minn. Stat. §§ 290.46 and 290.49, Subd. 1 (1980)[1] (Resp. App. 1A-3A); the tax lien statute, Minn. Stat. § 290.54 (1980) (Resp. App. 5A-6A); the tax levy statute, Minn. Stat. § 290.48, Subd. 2 (1980) (Resp. App. 2A-3A); the negligence penalty statute, Minn. Stat. § 290.53, Subd. 3a (1980) (Resp. App. 5A); and the interest statutes, Minn. Stat. § 270.75, Subd. 1 (1980) (Resp. App. 1A) and Minn. Stat. § 290.50, Subd. 1(e) (1980) (Resp. App. 3A-4A).

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[1] Reference is made to the 1980 version of Minnesota Statutes because the tax returns for the 1979 year at issue were due in 1980. Petitioners have cited to the 1978 version of Minnesota Statutes. However, there are no material differences between the 1978 and 1980 statutes at issue in this case.

Minnesota law set forth procedures for claiming refunds and also "appropriated from the general fund to the Commissioner of Revenue the amounts necessary to make payments of refunds." Minn. Stat. § 290.50 (1980). Resp. App. 3A-5A. Another statute provided, "notwithstanding any other provision of the law," for the payment from the State general fund of "refunds of taxes erroneously collected from taxpayers." Minn. Stat. § 290.62 (1980). Resp. App. 6A.

STATEMENT OF THE CASE

During 1979, Minnesota imposed an excise tax on banks measured by net income. Minn. Stat. § 290.361 (1978). Pet. App. 96. Interest on federal obligations was taxable while interest on certain state obligations was exempt. Respondents paid the tax on federal obligation interest for 1979 and thereafter timely filed claims for refund following the procedures set forth in Minn. Stat. § 290.50 ("Section 290.50"). Resp. App. 3A-5A. Respondents asserted as a basis for their claims that the Minnesota bank excise tax was discriminatory in violation of 31 U.S.C. § 742 (1959) ("Section 742") and the intergovernmental immunity doctrine. In support of their claims, they cited *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), which held a nearly identical Tennessee tax to be discriminatory and unconstitutional. After the expiration of a statutory six-month waiting period during which the Commissioner failed to act upon their claims, Respondents timely filed refund actions in Ramsey County District Court against the Commissioner and the State of Minnesota, again following the procedures set forth in Section 290.50.[2]

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[2] Respondent Norwest filed suit for the 1979 year only. Respondents Cambridge, First Security and Midway, together with approximately 200 other banks, filed suit for the years 1979 through 1983 in a separate action, which was consolidated with the Norwest suit by the district court. By agreement of counsel and order of the district court, Respondents Cambridge, First Security and Midway were selected as "test banks" from among the numerous plaintiffs in the case, and 1979 was selected as the "test year." Judgment was entered as to the

The trial court held that the bank excise tax discriminated against federal obligations (Pet. App. 59) and awarded refunds under Section 290.50. Pet. App. 85. In its initial decision dated July 20, 1990 ("*Cambridge I*"), the Minnesota Supreme Court reversed. The court agreed that the tax was discriminatory (Pet. App. 43), but nonetheless held that the bank excise tax should be treated as lawful for 1979 on the theory that the 1983 *Memphis Bank* decision announced a new rule of law that should be applied on a prospective-only basis. Pet. App. 53. The court also held that Respondents were estopped from claiming refunds[3] and that it could award Respondents purely prospective relief.[4] Pet. App. 45-50.

Respondents filed a petition for a writ of certiorari with the United States Supreme Court requesting review of the Minnesota Supreme Court's decision. While the petition was pending, the Court decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Because of the impact of *Beam* upon the issues addressed by Respondents' petition for writ of certiorari, the Court granted the petition, vacated the judgment of the Minnesota Supreme Court, and remanded the case for further consideration in light of *Beam*.

On remand, the Minnesota Supreme Court in a decision dated February 14, 1992 ("*Cambridge II*") reversed its original holding that *Memphis Bank* applied prospectively only. Pet. App. 25. However, the court adhered to its prior decision on estoppel

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test banks for the 1979 test year in accordance with Minnesota Rules of Civil Procedure 54.02, which permits final judgment with respect to fewer than all of the claims or parties when there is no just reason for delay.

[3] The court held that Respondents were estopped from challenging discrimination against federal obligations because Respondents also owned state obligations. (Pet. App. 25-30.)

[4] The court purported to award prospective relief by severing exemptions for state bonds on a prospective basis, an action having no practical effect since the Minnesota Legislature had previously repealed the exemptions following *Memphis Bank*, 1983 Minn. Laws Ch. 213.

and it again awarded "purely prospective relief." Pet. App. 33-36. The court distinguished *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), in which a similar "purely prospective" remedy was held unconstitutional, because *McKesson* was a Commerce Clause case involving "comparative economic disadvantage" to other taxpayers caused by the discriminatory tax, whereas the damage in the instant case was to the Federal Government itself. Pet. App. 33. The court also distinguished *McKesson* because the taxpayer there had no clear prepayment remedy, whereas the court believed that Respondents had the option under state law to challenge the tax in the Minnesota Tax Court prior to paying it. Pet. App. 33.

Respondents again filed a petition for a writ of certiorari with the United States Supreme Court. While this second petition was pending, the Court decided *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). The Court granted the petition, vacated the judgment, and again remanded the case to the Minnesota Supreme Court, this time for further consideration in light of *Harper*.

On remand, in a decision dated April 1, 1994 ("*Cambridge III*"), the Minnesota Supreme Court held: "After *Harper*, we can no longer distinguish *McKesson* on the ground that it applies only to commerce clause cases." Pet. App. 9. The court then analyzed Minnesota tax procedures and found (i) that there was no clearly available procedure for challenging taxes on a prepayment basis in 1980,[5] and (ii) that there was a clearly available refund procedure that Respondents followed. Pet. App. 12-13. The court held that

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[5] In making this finding, the court reversed its decision in *Cambridge II*. One explanation for this reversal is that Petitioners' claim that Respondents should have litigated in the Tax Court rather than the district court was first presented by Petitioners in their *reply* brief to the Minnesota Supreme Court in *Cambridge II*, at which point Respondents were allowed no additional briefing. By contrast, the issue was fully briefed by both sides in *Cambridge III*. Petitioners did not claim that Respondents were litigating in the wrong court during trial of the case. Nor did they make this argument in *Cambridge I*.

refunds should be awarded to Respondents and rested its decision on two alternative theories.

First, citing *McKesson*, the court held that because of the absence of a prepayment procedure, the court was required to design a remedy "which creates in hindsight a nondiscriminatory scheme." Pet. App. 15. The court considered and rejected a remedy that would have imposed a retroactive tax on exempt state obligations,[6] and concluded that the appropriate remedy was to award refunds payable over a four-year period in order to mitigate the financial burden upon the State.

As an alternative ground, the court held that Respondents' reliance on the Minnesota refund statute entitled them to refunds. The court noted that Minnesota taxpayers in 1980 had not been put on notice that they should bring constitutional challenges in the Minnesota Tax Court. Accordingly, the court concluded that "*even if there was a predeprivation remedy in 1980*," Respondents were entitled to refunds. Pet. App. 14 (emphasis added). The court cited *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) in support of this conclusion. Pet. App. 15.

REASONS FOR DENYING THE WRIT

Petitioners request certiorari to reverse the decision of the Minnesota Supreme Court awarding refunds to Respondents. They cite *McKesson* and *Harper* in support of their position. However, *McKesson* and *Harper* addressed only the *minimum* due process that a state must provide. The Court in both cases made clear that a state "may provide relief beyond the demands of federal due process." *Harper*, 113 S. Ct. at 2520; *see also McKesson*, 496 U.S. at 52 n.36. A state is "free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal [due process] requirements." *McKesson*, 496 U.S. at 51-52.

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[6] In so deciding, the court took note of the practical difficulty that the Commissioner would have in actually collecting a retroactive tax applicable to the 1979 tax year, as well as of the questionable constitutionality of imposing such a tax on income earned fifteen years ago. Pet. App. 16.

Petitioners ask this Court to reverse the Minnesota Supreme Court because, in their view, the court gave Respondents more than due process requires. However, even if this were true, the extent to which a state chooses to provide more than minimal due process involves an issue of state law that does not implicate the Federal Constitution. Accordingly, the petition for certiorari does not raise a substantial federal question. For this reason, and for the reasons set forth below, the petition should be denied.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE MINNESOTA SUPREME COURT RESTED ITS DECISION UPON AN ALTERNATIVE GROUND THAT WAS AN INDEPENDENT AND ADEQUATE STATE LAW GROUND, AND THAT WAS NOT CHALLENGED IN THE PETITION.

Petitioners have presented three questions in their petition. Each of the three asks whether different aspects of the Minnesota Supreme Court's decision following *Harper*, and by extension *McKesson*, were correct. However, the Minnesota Supreme Court did not rest its decision entirely on *Harper* and *McKesson*. The court held, in the alternative, that Respondents' use of and reliance upon the Minnesota statutory refund procedures gave them a right to a refund. The court stated:

> The existence of the tax refund statute in Minnesota provides further support for our decision. To rely on the bank's use of the refund statute to now deny them a remedy would effectively deny the banks a meaningful hearing without adequate notice. Prior to the *McKesson* decision, taxpayers had no notice that they were required to take advantage of any predeprivation procedures in order to qualify for a refund. Even if there was a predeprivation remedy in 1980, the banks did not know when they chose between filing for a refund in district court and filing in tax

court, that in choosing a refund action, they were foreclosing their right to recovery.* Moreover, the tax refund statute did not have a requirement that the tax be paid under protest or that the taxpayer attempt to first take his or her claim to tax court. *See Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673 (1930) (finding due process violation when Missouri Supreme Court denied remedy to taxpayer by holding that taxpayer failed to take advantage of administrative remedies when court had previously found agency lacked power to hear the type of case at issue).

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* This issue did not arise in *McKesson* itself because the Court there found that taxpayers did not have a meaningful predeprivation remedy, thus a remedy was due regardless of whether it was required under Florida's tax refund statute.

Pet. App. 14-15. This holding is unquestionably correct and has not been challenged by Petitioners.

In *Harper* and *McKesson*, this Court held that a state must, at a minimum, provide meaningful postdeprivation relief (which may consist of refunds) if the state does not provide a clear and certain predeprivation remedy. The Court also held that a state is "free, of course, to provide broader relief as a matter of state law than is required by the federal Constitution." *McKesson*, 496 U.S. at 52 n.36. Minnesota went beyond the due process minimum when it adopted Section 290.50, the state income tax refund statute.

At common law, taxpayers were precluded from recovering voluntarily paid taxes. *Horn v. City of Minneapolis*, 234 N.W. 289 (Minn. 1930). Many jurisdictions, including the Federal Government, have liberalized the common law rule by adopting

refund statutes allowing the recovery of such taxes.[7] Minnesota statutes have long provided for the recovery of voluntarily paid taxes. In the instant case, the Minnesota Supreme Court expressly stated that Section 290.50 "did not have a requirement that the tax be paid under protest . . ." Pet. App. 15. *See also Acton Constr. Co. v. Commissioner of Revenue*, 391 N.W.2d 828, 832 (Minn. 1986) (discussing sales tax statute substantially similar to Section 290.50).

The Minnesota Supreme Court has consistently construed Minnesota's refund statutes as requiring the Commissioner to refund unconstitutional taxes. For example, on remand from this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Minnesota Supreme Court affirmed the judgment of the trial court awarding refunds of an unconstitutional sales and use tax. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 332 N.W.2d 914 (Minn. 1983). In another recent case, the Minnesota Supreme Court affirmed the trial court's award of refunds where the individual income tax in question violated Section 742, the same federal statute involved in this case. *Yurista v. Commissioner of Revenue*, 460 N.W.2d 24 (Minn. 1990). The taxpayer's refund action was brought under Section 290.50.

In awarding refunds to Respondents, the Minnesota Supreme Court was simply following Section 290.50 and its prior decisions. Accordingly, this alternative basis for the court's decision is properly viewed as an independent and adequate state law ground. The United States Supreme Court is without jurisdiction to review a decision based upon an independent and adequate state law ground. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The petition must therefore be denied.

Even if the basis for the court's holding were not strictly a state law ground, but also involved due process principles, the

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[7] *See George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (by adopting the federal refund statute, "[a] high-minded Government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience.")

petition should nonetheless be denied because Petitioner has not objected to this holding of the Minnesota Supreme Court. *See Irvine v. California*, 347 U.S. 128, 129 (1954) (certiorari limited to questions identified in the petition). Furthermore, the court's holding was clearly correct.

As the Minnesota Supreme Court noted, even if the Minnesota Tax Court was available to resolve constitutional challenges in 1980, Section 290.50 was also available as an alternative procedure. In fact, in a 1979 case upholding the creation of the Minnesota Tax Court against constitutional challenge, the Minnesota Supreme Court observed that "it is crucial to note that the taxpayer always has the option to file in district court" by paying the tax and claiming a refund under Section 290.50, and that "[t]his is perhaps the saving feature of this statutory scheme." *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 225 (Minn. 1979).

Respondents relied upon and strictly followed the refund procedures of Section 290.50. Petitioners did not object to the use of Section 290.50 or to Respondents' compliance therewith during the trial phase of this case. It was only in *Cambridge II*, following the remand of the case by this Court in light of *Beam*, that Petitioners for the first time claimed that refunds could be denied because Respondents could have challenged the tax in the Minnesota Tax Court prior to paying it. By that time, of course, the alternative route was no longer open to Respondents because they had already paid the tax and claimed a refund. Under these circumstances, the Minnesota Supreme Court correctly held that to deny Respondents the use of the refund statute would be to "effectively deny the banks a meaningful hearing without adequate notice." Pet. App. 14.[8]

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[8] *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), which was cited by the Minnesota Supreme Court, is closely analogous. The state court there had previously held that the state tax authorities did not have jurisdiction over constitutional tax challenges and also held that such challenges could be brought as injunction actions. Following this procedure, the taxpayer bypassed the tax commissioner in a constitutional challenge to a tax. On appeal to the state

It should be noted that the issue of whether a taxpayer's reliance upon a state refund statute creates an interest protected by due process is not presented in *Reich v. Collins*, 437 S.E.2d 320 (Ga. 1993), *cert. granted in part*, 114 S. Ct. 1048 (1994).[9] Thus, there is no reason to defer decision on the Petitioners' petition pending decision in *Reich*, as requested by Petitioners. Pet. App. 11. The petition should be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE, AS FOUND BY THE MINNESOTA SUPREME COURT, RESPONDENTS DID NOT HAVE A CLEAR AND CERTAIN REMEDY AVAILABLE TO THEM IN THE MINNESOTA TAX COURT.

Under *McKesson*, if a state does not offer a "meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," then the state must provide postdeprivation relief. 496 U.S. 18, 38 n.21. A "meaningful opportunity" exists only if there is a "fair opportunity to challenge the accuracy and legal validity of" a tax as well as "a 'clear and certain remedy' for any erroneous or unlawful tax collection . . ." 496 U.S. 18 (citation omitted).

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supreme court, the court reversed its prior decision and held that the taxpayer should have exhausted its administrative remedies. Since the period of limitations for doing so had passed, the court dismissed the taxpayer's suit. The United States Supreme Court reversed because the state court had "denied to the plaintiff due process of law -- using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* at 678.

[9] Certiorari was granted only on the question of whether the State of Georgia provided a clear and certain remedy to the taxpayers in *Reich*. The Court denied certiorari on the issue of whether the taxpayer in *Reich* had a due process interest in the Georgia refund statute, presumably because the Georgia Supreme Court as a matter of state law held that the refund statute was inapplicable. By contrast, the Minnesota Supreme Court has held that the Minnesota refund statute applies to this case.

The Minnesota Supreme Court concluded that the remedies available by petition to the Minnesota Tax Court were not "clear and certain" in 1980 because the Tax Court did not have jurisdiction over constitutional challenges to state taxes, and because there was no established procedure in place in 1980 by which the Tax Court could have acquired such jurisdiction. While the adequacy of a predeprivation remedy is a federal question, clearly the state courts are in the best position to understand the intricacies of state tax procedure. If a state supreme court determines that its prepayment procedures were not "clear and certain" in the constitutional sense, then this Court as a general rule ought to defer to that determination.

In the instant case, there is absolutely no question but that the Minnesota Supreme Court was correct in holding that Respondents in 1980 did not have a "clear and certain" remedy in the Minnesota Tax Court. The present full-time Minnesota Tax Court was created in 1977. 1977 Minn. Laws Ch. 307. Previously there had been various administrative bodies authorized to hear tax disputes. *See* Gustafson, *Minnesota Tax Appeals* § 1.01 (1992). From the beginning, there was considerable doubt regarding the authority of the Tax Court to hear constitutional claims because the court was an administrative agency of the executive branch of state government rather than a true court.

In a 1977 case, *Harris v. Commissioner of Revenue*, 257 N.W.2d 568 (Minn. 1977), the Minnesota Supreme Court questioned the jurisdiction of the Tax Court to decide constitutional issues without the jurisdictional issue having even been raised by the parties to the case. 257 N.W.2d at 569 n.1. After *Harris*, taxing authorities -- including the Department of Revenue -- began to assert that taxpayers could not bring constitutional claims in the Tax Court. The issue was decided in two 1980 cases, *In re McCannel*, 301 N.W.2d 910 (Minn. 1980) and *Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138 (Minn. 1980). In these cases the Minnesota Supreme Court held that the Tax Court did not have constitutional jurisdiction. Further, the Minnesota

Supreme Court in these cases did not establish any procedure by which the Tax Court could obtain constitutional jurisdiction.[10]

After *McCannel* and *Guilliams* were decided, the Tax Court dismissed for lack of subject matter jurisdiction claims that challenged the constitutionality of a statute *per se*. *See DeCoster v. Commissioner of Revenue*, No. 3207-S, 1981 W.L. 1456 (Minn. Tax Ct. Jan. 29, 1981). In its opinion below, the Minnesota Supreme Court concluded that, had Respondents brought their case in the Tax Court, the case would either have been dismissed or -- at best -- transferred to a state district court where payment of the tax might have been required.[11] Pet. App. 13-14. The Court compared this highly dubious procedure with the alternative refund procedure under Section 290.50, and observed: "In light of the uncertainty regarding the reach of the tax court's jurisdiction and the clear availability of the statutory refund procedure, we cannot assert that the meaningful predeprivation remedy required by *McKesson* existed in early to mid-1980," and that the existence of such a remedy was "even more questionable" after that. Pet. App. 12-13.[12] This conclusion was clearly correct.[13]

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[10] *McCannel* and *Guilliams* were foreshadowed by *Dependents of Ondler v. Peace Officers Benefit Fund*, 289 N.W.2d 486 (Minn. 1980), decided in January 1980, in which it was held that the Workers' Compensation Court of Appeals, which was an administrative agency of the executive branch of state government like the Tax Court, did not have jurisdiction to decide constitutional issues.

[11] State district courts have never had jurisdiction to hear appeals from orders of the Commissioner on a prepayment basis.

[12] In 1984, the Minnesota Supreme Court approved a procedure under which the Tax Court could obtain jurisdiction over constitutional questions in a case if it transferred the case to a district court and if the district court transferred the case back to the Tax Court. *Erie Mining Co. v. Commissioner of Revenue*, 343 N.W.2d 261 (Minn. 1984). In its opinion below, the Minnesota Supreme Court correctly observed that this procedure was available in 1980 only through hindsight. In their petition, Petitioners dispute this observation, noting that another taxpayer successfully used the so-called "*Erie* shuffle" prior to the *Erie* decision. *See Nagaraja v. Commissioner of Revenue*, 352 N.W.2d 373 (Minn.

Further, the issue raised by the Petitioners is not of such importance as to warrant review by this Court. The issue is of historical interest only, since Minnesota's tax procedures have changed in a number of respects following the year at issue.

Finally, as noted above, even if a predeprivation procedure was available in 1980, the Minnesota Supreme Court was free to go beyond the minimum due process requirements by awarding refunds. Accordingly, the petition should be denied.

III. CERTIORARI SHOULD BE DENIED BECAUSE STATE LAW AND THE FEDERAL CONSTITUTION ALLOW THE MINNESOTA SUPREME COURT TO ORDER REFUNDS OF VOLUNTARILY PAID TAXES.

Petitioners argue that the Court should grant certiorari to decide whether states are "required" to provide refunds of

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1984). Pet. App. 15-16 n.9. This is disingenuous for, as the Minnesota Supreme Court observed, *Nagaraja* was a refund case, not a prepayment case. Further, the procedure was so *unclear* that the Commissioner argued in *Nagaraja* that the Tax Court lacked jurisdiction notwithstanding the district court transfer. Pet. App. 13 n.10.

[13] Petitioners also claim that a prepayment remedy existed in the form of a declaratory judgment action. Pet. 21 n.13. They did not present this claim to the Minnesota Supreme Court. In any event, a declaratory judgment action could not have been brought in light of *Land O' Lakes Dairy Co. v. Village of Sebeka*, 31 N.W.2d 660 (Minn.), *cert. denied*, 334 U.S. 844 (1948), in which it was held that an action for declaratory judgment could not be brought if a statutory remedy for challenging a tax existed. *See also M.A. Mortenson Co. v. Minnesota Comm'r of Revenue*, 470 N.W.2d 126 (Minn. Ct. App. 1991) (following *Land O' Lakes Dairy*). Petitioners' claim that Respondents had a prepayment remedy in the form of an administrative protest also was not presented to the Minnesota Supreme Court, and is also erroneous. As a member of the executive branch of state government, the Commissioner would have had no more power to declare a statute unconstitutional than the Tax Court would have had. *Cf. Dependents of Ondler*, 289 N.W.2d at 487 n.1 (administrative agencies do not have jurisdiction to adjudicate the constitutionality of legislation).

unconstitutional taxes if the taxes were voluntarily paid. This issue is simply not presented by the Minnesota Supreme Court's decision in *Cambridge III*.

As noted above, the decision rested upon two grounds. Insofar as the court held that it should award refunds under Section 290.50, the issue does not arise because Section 290.50 allows taxpayers to recover taxes that were voluntarily paid. The court observed that "the tax refund statute did not have a requirement that the tax be paid under protest . . ." Pet. App. 15. The Minnesota Supreme Court awarded refunds not because it believed that federal law required it to do so, but rather because the court was following Minnesota law. The holding is therefore one of state law and does not raise an issue reviewable by this Court.

Insofar as the court's decision rested upon its conclusion that *McKesson* required it to "design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme," Pet. App. 15, the Minnesota Supreme Court was simply fulfilling its role within the federal system of determining what the remedy for an unconstitutional tax should be. *McKesson* holds that a "clear and certain remedy" is required, but that a state "may satisfy this obligation through any form of relief," including refunds. 496 U.S. at 51. A state is "free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal [due process] requirements." 496 U.S. at 51-52; *cf. Harper*, 113 S. Ct. at 2520 (". . . we leave to Virginia courts . . . the crafting of any appropriate remedy.")

The Minnesota Supreme Court considered and rejected the possibility that a retroactive tax on exempt state obligation income would cure the discrimination against federal obligations that existed in 1979. It also considered and rejected a partial retroactive tax coupled with partial refunds. Pet. App. 15-17. The court noted that refunds would place a burden on the state, but also noted that "the state has collected the unconstitutional tax for many years for which the banks will not recover due to the statute of limitations on tax refund actions." Pet. App. 16. After giving "consideration to equitable factors in fine-tuning this refund

remedy," the court ordered the payment of refunds over four years. Pet. App. 17.

This Court has left to the state courts the task of crafting appropriate remedies for unconstitutional taxation. A state "may provide relief beyond the demands of federal due process, but under no circumstances may it confine [a taxpayer] to a lesser remedy." *Harper*, 113 S. Ct. at 2520 (citations omitted). Even if the taxes at issue in this case were voluntarily paid,[14] and even if there had been no refund statute in Minnesota, the Minnesota Supreme Court would clearly have been entitled to go beyond the minimal demands of federal due process and award refunds.

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[14] The petition cites "credible explanations" for why Petitioners believe the tax payments were voluntary. Pet. 23-25. However, these "explanations" are based on sheer speculation and have no support in the record. Respondents do not agree that the taxes in question were voluntarily paid. When a tax is paid "in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." *McKesson*, 496 U.S. at 38 n.21. Under Minnesota law in 1980, the year the taxes in question were due and payable, a taxpayer electing to challenge a tax would have been under duress to pay the tax. The Commissioner was empowered to assess a tax deficiency, Minn. Stat. §§ 290.46 and 290.49, Subd. 1 (1980), Resp. App. 1A-3A, and assessment had to occur before the taxpayer could file an appeal with the Tax Court. Following assessment, the Commissioner had the power to impose a lien upon all of the taxpayer's property, except a homestead, by filing a notice of lien. Minn. Stat. § 290.54. Resp. App. 5A-6A. If a tax was not paid "within 60 days after it [was] required to be paid," the Commissioner had the power to levy upon and sell the real and personal property of the taxpayer. Minn. Stat. § 290.48, Subd. 2 (1980). Resp. App. 2A-3A. Since taxes were required to be paid within 60 days following assessment, Minn. Stat. § 290.46 (1980), Resp. App. 1A-2A, the Commissioner had the power to levy during the pendency of a Tax Court proceeding. Further, a taxpayer withholding payment of tax might be assessed a negligence penalty equal to 5 percent of an assessment. Minn. Stat. § 290.53, Subd. 3a (1980). Resp. App. 5A. Moreover, interest on deficiencies accrued at eight percent in 1980, as compared with the refund interest rate of six percent. Minn. Stat. §§ 270.75, Subd. 1 and 290.50, Subd. 1(a). Resp. App. 1A and 4A. All of these provisions created duress to pay the tax, thus obligating Minnesota to provide postdeprivation relief in the form of refunds. Respondents presented this argument to the Minnesota Supreme Court, but the court did not reach the issue.

Accordingly, the question presented does not raise a substantial federal question and the petition should be denied.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE MINNESOTA SUPREME COURT'S DECISION ON ESTOPPEL RESTED UPON STATE LAW AND BECAUSE, IN ANY EVENT, ESTOPPEL IS NOT A PROCEDURAL BAR.

Petitioners have argued that Respondents should be estopped under the so-called acceptance of benefits doctrine from recovering refunds of taxes paid on federal obligation interest income because they owned state obligations. The acceptance of benefits doctrine applies only if a litigant receives a benefit from a statute that is claimed to be unconstitutional. *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 456-457 (1988). For example, in *Fahey v. Mallonee*, 332 U.S. 245 (1947), a federal savings and loan was estopped from challenging conditions in a statute under which it was organized.

The trial court found as a fact that Respondents did not benefit from the provisions of Minnesota Statutes that they claimed were unconstitutional (i.e., the tax on federal obligation interest), and also held that the theory was no longer the law in Minnesota. Pet. App. 65-66. The Minnesota Supreme Court affirmed the trial court without explicitly discussing the estoppel issue. While the basis for the court's decision is unclear, its affirmance of the trial court indicates that it agreed with the trial court on the facts, on the law, or on both the facts and the law. None of these grounds presents a question reviewable by this court.

Nonetheless, Petitioners claim that estoppel is a procedural bar that can be raised as a defense to refund actions. The Court in *McKesson* observed that a state could "provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint," and that it could also "enforce relatively short statutes of limitation." 496 U.S. at 45. Even if the estoppel theory had been accepted by the Minnesota Supreme Court, however, estoppel would not have

been a procedural bar; it would have been a substantive bar. *See Suske v. Straka*, 39 N.W.2d 745, 750 (Minn. 1949)(estoppel not a rule of evidence or procedure, but a rule of substantive law).[15] There is nothing in the least procedural about it. The procedural requirements (including a statute of limitations) for obtaining a tax refund in Minnesota were set forth in Section 290.50. Respondents strictly complied with the requirements of this statute.

Furthermore, it should again be noted that the Minnesota Supreme Court was free to choose what sort of relief it would provide, so long as it satisfied the minimum federal due process requirements. *McKesson*, 496 U.S. at 51-52. The court was under no obligation to apply the estoppel doctrine, even if it were applicable.[16] Accordingly, Petitioners' petition for certiorari should be denied.

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[15] Petitioners assert that estoppel is a procedural bar, citing *Cambridge I* and *II*. Pet. 25. However, the decisions in *Cambridge I* and *II* were left without force or effect following the remands in light of *Beam* and *Harper*. Pet. App. 5; Pet. App. 22. The holding in *Suske* that estoppel is substantive has thus not been overruled in Minnesota. In any event, merely labelling estoppel as a procedural bar when it manifestly is not cannot control for federal constitutional purposes.

[16] Respondents argued in the Minnesota Supreme Court that the doctrine was *not* applicable for the following reasons: that the doctrine was no longer the law in Minnesota; that the doctrine was inapplicable on the facts; that the doctrine was inapplicable because Respondents did not receive a benefit; and that application of the doctrine would discriminate against persons bringing claims under Section 742.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

Minn. Stat. § 270.75 (1980) INTEREST PAYABLE TO COMMISSIONER.

Subdivision 1. If any tax payable to the commissioner of revenue or to the department of revenue is not paid within the time specified by law for payment, the unpaid tax shall bear interest at the rate of eight percent per annum from the date such tax should have been paid until the date that the tax was paid, unless otherwise provided by law. Unpaid taxes collected under section 290.92 or under chapter 297A shall bear interest at the rate of ten percent per annum from the date such tax should have been paid until the date that the tax was paid.

Minn. Stat. § 290.46 (1980) EXAMINATION OF RETURNS; ASSESSMENTS, REFUNDS.

The commissioner shall, as soon as practicable after the return is filed, examine the same and make any investigation or examination of the taxpayer's records and accounts that he may deem necessary for determining the correctness of the return. The tax computed by him on the basis of such examination and investigation shall be the tax to be paid by such taxpayer. If the tax found due shall be greater than the amount reported as due on the taxpayers's return, the commissioner shall assess a tax in the amount of such excess and the whole amount of such excess shall be paid to the commissioner within 60 days after notice of the amount and demand for its payment shall have been mailed to the taxpayer by the commissioner. If the understatement of the tax on the return was false and fraudulent with intent to evade the tax, the installment of the tax shown by the taxpayer on his return which have not yet been paid shall be paid to the commissioner within 60 days after notice of the amount thereof and demand for payment shall have been mailed to the taxpayer by the commissioner. If the

amount of the tax found due by the commissioner shall be less than that reported as due on the taxpayer's return, the excess shall be refunded to the taxpayer in the manner provided by section 290.50 (except that no demand therefor shall be necessary), if he has already paid the whole of such tax, or credited against any unpaid installment thereof; provided, that no refundment shall be made except as provided in section 290.50, after the expiration of three and one-half years after the filing of the return . . . .

Minn. Stat. § 290.48 (1980) DELINQUENT TAXES, COLLECTION.

Subdivision 2. **Levy and sale.** If a tax imposed by this chapter, or any portion of such tax, is not paid within 60 days after it is required to be paid thereunder, the commissioner shall issue his warrant to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the taxpayer and to levy upon the rights to property of the taxpayer within the county, and to return such warrant to the commissioner and pay to him the money collected by virtue thereof by a time to be therein specified, not less than 60 days from the date of the warrant. The sheriff shall proceed thereunder to levy upon and seize any property of the taxpayer and to levy upon the rights to property of the taxpayer within his county, except the homestead and household goods of the taxpayer and property of the taxpayer not liable to attachment, garnishment, or sale on any final process issued from any court under the provisions of section 550.37, and shall sell so much thereof as is required to satisfy such taxes, interest, and penalties, together with his costs; but such sales shall, as to their manner, be governed by the laws applicable to sales of like property on execution issued against property upon a judgment of a court of record. The proceeds of such sales, less the sheriff's costs, shall be turned over to the commissioner, who shall retain such part thereof as is required to satisfy the tax, interest, penalties, and costs, and pay over any balance to the taxpayer. The commissioner shall not proceed under this subdivision until the

expiration of 60 days after mailing to the taxpayer, at his last known address, a written notice of the amount of taxes, interest, and penalties due from the taxpayer and demand for their payment. Any action taken by the commissioner pursuant to this subdivision shall not constitute an election by the state to pursue a remedy to the exclusion of any other remedy provided for in this act.

Minn. Stat. § 290.49 (1980) TIME LIMIT ON ASSESSMENT, COLLECTION.

Subdivision 1. **Assessment, generally.** Except as otherwise provided in this chapter the amount of taxes assessable shall be assessed within three and one-half years after the return is filed. Such taxes shall be deemed to have been assessed within the meaning of this section whenever the commissioner shall have determined the taxable net income of the taxpayer and computed and recorded the amount of tax with respect thereto, and if the amount is found to be in excess of that originally declared on the return, whenever the commissioner shall have prepared a notice of tax assessment and mailed the same to the taxpayer. The notice of tax assessment shall be sent by mail to the post office address given in the return, and the record of such mailing shall be presumptive evidence of the giving of such notice, and such records shall be preserved by the commissioner.

Minn. Stat. § 290.50 (1980) OVERPAYMENT, CLAIMS FOR REFUND OR CREDITS.

Subdivision 1. **Procedure, time limit.** (a) A taxpayer who has paid or from whom there has been collected an amount of tax for any year in excess of the amount legally due for that year, may file with the commissioner a claim for a refund of such excess. Except as otherwise provided in this section, no claim or refund shall be allowed or made after three and one-half years from the date prescribed for filing the return (plus any extension of time granted

for filing the return, but only if filed within the extended time) or after two years from the date of overpayment, whichever period is longer, unless before the expiration of the period a claim is filed by the taxpayer. For this purpose an income tax return or amended return claiming an overpayment shall constitute a claim for refund.

* * * *

(e) Except as provided in section 290.92, subdivision 13, and 290.936, interest on the overpayment refunded or credited to the taxpayer shall be allowed at the rate of six percent per annum computed from the date of payment of the tax until the date the refund is paid or credit is made to the taxpayer. However, to the extent that the basis for the refund is a net operating loss carryback, a capital loss carryback or the carryback of a pollution control credit, interest shall be computed only from the end of the taxable year in which the loss occurs or in which the pollution control credit arises.

* * * *

(g) There is hereby appropriated from the general fund to the commissioner of revenue the amounts necessary to make payments of refunds allowed pursuant to this section.

* * * *

Subdivision 2. Denial of claim, court proceedings. If the claim is denied in whole or in part, the commissioner shall mail an order of denial to the taxpayer in the manner prescribed in section 290.46. An appeal from this order may be taken to the Minnesota tax court in the manner prescribed in section 271.06, or the taxpayer may commence an action against the commissioner to recover the denied overpayment. Such action may be brought in the district court of the district in which lies the county of his residence or principal place of business or if an estate or trust, of the principal place of its administration, or in the district court for

Ramsey county. The action in the district court shall be commenced within 18 months following the mailing of the order of denial to the taxpayer. If a claim for refund is filed by a taxpayer and no order of denial is issued within six months of the filing, the taxpayer may commence an action in the district court as in the case of a denial, but the action shall be commenced within two years of the date that the claim for refund was filed.

Minn. Stat. § 290.53 (1980) PENALTIES, INTEREST.

Subdivision 3a. **Intentional disregard of rules and regulations.** If any part of any additional assessment, as determined under section 290.46, is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to five percent of such additional assessment.

Minn. Stat. § 290.54 (1980) TAX A PERSONAL DEBT.

The tax imposed by this chapter, and interest and penalties imposed with respect thereto, shall become a personal debt of the taxpayer from the time the liability therefor arises, irrespective of when the time for discharging such liability by payment occurs. The debt shall, in the case of the personal representative of the estate of a decedent and in the case of any fiduciary, be that of such person in his official or fiduciary capacity only unless he shall have voluntarily distributed the assets held in such capacity without reserving sufficient assets to pay such tax, interest, and penalties, in which event he shall be personally liability for any deficiency. This provision shall apply only to cases in which this state is legally competent to impose such personal liability.

The tax imposed by this chapter, and interest and penalties imposed with respect thereto, shall become a lien upon all of the property, both real and personal, of the taxpayer within this state, except his homestead, from and after the filing by the

commissioner of a notice of such lien in the office of the county recorder of the county in which such property is situated, or in the case of personal property belonging to an individual who is not a resident of this state, or which is a corporation, partnership, or other organization, in the office of the secretary of state.

The lien created under this section shall become effective with respect to personal property from and after the date of filing by the commissioner of a notice of such lien describing the property to which the lien attaches in the office of the county recorder of the county in which the commissioner believes the property is located at the time such lien is filed, and with the secretary of state.

The lien imposed on personal property by this section, even though properly filed, shall not be valid as against a purchaser with respect to tangible personal property purchased at retail or as against the personal property listed as exempt in sections 550.37, 550.38, and 550.39.

Minn. Stat. § 290.62 (1980) DISTRIBUTION OF REVENUES.

All revenues derived from the taxes, interest, penalties and charges under this chapter shall, notwithstanding any other provisions of law, be paid into the state treasury and credited to the general fund, and be distributed as follows:

(1) There shall, notwithstanding any other provisions of law, be paid from this general fund all refunds of taxes erroneously collected from taxpayers under this chapter as provided herein;

(2) There is hereby appropriated to the persons entitled to payment herein, from the fund or account in the state treasury to which the money was credited, an amount sufficient to make the refund and payment.